IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2001

# STATE OF TENNESSEE v. JOHN ROBERT BENTON

**Direct Appeal from the Criminal Court for Cocke County**
**No. 7550 Jerry Beck, Judge**

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**No. E2000-03194-CCA-R3-CD**
**July 20, 2001**

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The defendant, John Robert Benton, pled guilty in the Cocke County Criminal Court to burglary, Tenn. Code Ann. § 39-14-402(a)(1), and vandalism, Tenn. Code Ann. § 39-14-408, both Class D felonies. He also pled guilty to theft of property less than five hundred dollars ($500), a Class A misdemeanor. Thereafter, the trial court sentenced Defendant as a Range I standard offender to terms of four years for each of the felony convictions and eleven months and twenty-nine days for the misdemeanor offense. On appeal, Defendant raises the following issues: (1) whether the trial court erred by failing to apply an appropriate mitigating factor and by improperly enhancing Defendant's sentences for his felony convictions, and (2) whether the trial court erred when it failed to address the criteria set forth in Tenn. Code Ann. § 40-35-103 concerning alternative sentencing. After a review of the record, we affirm the judgment of the trial court as modified.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed as Modified**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JERRY L. SMITH, J., joined.

Edward C. Miller, District Public Defender; and Susanna Thomas, Assistant Public Defender, Newport, Tennessee, for the appellant, John Robert Benton.

Paul G. Summers, Attorney General and Reporter; Angele M. Gregory, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Ronald C. Newcomb, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. Factual Background

On the evening of August 17, 1998, Defendant threw a rock through a window of the Stokeley Memorial Public Library in Newport, Tennessee, and entered the building without

permission. Once inside, Defendant proceeded to destroy library property including computers, fax machines, furniture, and other office equipment, and also damaged the walls, ceiling tiles, and air conditioning system. In addition, Defendant cut himself on shards of glass while breaking into the building and left substantial amounts of blood on the property which had to be cleaned in accordance with health and safety regulations. Cleaning costs and property damage to the library totaled $5692.00. The police department was alerted to the illegal entry by the library's alarm system and apprehended Defendant a few blocks from the scene. At the time of his arrest, Defendant possessed numerous items belonging to the library, e.g., postage stamps, compact discs, and the library's keys, the value of which was estimated at less than $500.

At the sentencing hearing Defendant testified that, with regard to previous convictions, he has always paid his restitution fees, complied with court orders, and never violated probation. Defendant also admitted to having a problem with alcohol. He claimed that the current charges were alcohol-related and that his actions were the result of "very poor judgment" because he "had a lot to drink that night," and he would never have committed the crimes if he had been sober.

The trial court noted that the presumptive sentence for a Range I standard offender convicted of a Class D felony was two years and found that two statutory enhancement factors were applicable in Defendant's case: (1) "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; and (7) "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement." Tenn. Code Ann. § 40-35-114(1), (7) (1997). In support of factor (7), the court opined that "vandalisms are done for fun, to make people feel good, that type of thing" and while some of the damage may not have been intentional, e.g., the damage caused by Defendant's bleeding onto the property, a significant portion of it was done purposefully. According to the trial court, the pre-sentence report indicated that Defendant "went upstairs and stomped out the ceiling tiles . . . just trying to tear something up." The trial court found one mitigating factor applicable: (1) "[t]he defendant's criminal conduct neither caused nor threatened serious bodily injury," Tenn. Code Ann. § 40-35-113(1), but assigned this factor very little weight. At the conclusion of the sentencing hearing, the trial court imposed the maximum sentence of four years for each of Defendant's two felony convictions.

The trial court then considered the manner of service of the sentence. Defendant testified that he had been employed full time for two and one-half years and that he was the sole support of his wife and four children. He further testified that he was regularly attending Alcoholics Anonymous meetings and had not had a drink in six months. Defendant's wife also testified. She corroborated Defendant's claim that he regularly attended "AA" meetings and that he had been sober for six months or more, but admitted that Defendant has had a drinking problem for the ten years they have been married. Defendant's wife also testified that since she was unable to work, Defendant's incarceration would mean that she could lose her home and her children.

At the conclusion of the probation hearing, the trial court denied Defendant probation based, in part, on Defendant's prior criminal record, which the court declared was "substantial" even when

the dismissed and retired offenses were ignored. The trial court considered the nature of the crime–the fact that Defendant intentionally destroyed the city of Newport's Library–as well as the propriety of a Community Corrections program for Defendant, but decided that it did not believe this method of service would be in the best interests of the public or Defendant. As a result, the trial court found "incarceration [wa]s the best recourse in this case."

## II. Analysis

When a defendant appeals the length, range, or manner of service of a sentence imposed by the trial court, including the grant or denial of probation, this Court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). If the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, the presumption of correctness falls and appellate review of the sentence is purely de novo. Ashby, 823 S.W.2d at 169; State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The burden is on the defendant to show the impropriety of the sentence. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d) (1997).

Appellate review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210(b) (1997); Jones, 883 S.W.2d at 600; Ashby, 823 S.W.2d at 168.

If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). The trial court must place on the record the reasons for the sentence. Jones, 883 S.W.2d at 599.

Defendant challenges both the length and the manner of service of his sentence. Regarding the former, Defendant argues that the trial court erred when it failed to apply an appropriate mitigating factor and again when it improperly enhanced Defendant's sentences for the felony convictions to the maximum in the range. Defendant does not challenge the applicability of enhancement factor (1), but asserts that the record contains no proof that he committed the crime of vandalism for personal gratification and, therefore, enhancement factor (7) (utilized when "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement") is not applicable.

Defendant was sentenced as a Range I, standard offender, for which the applicable range for Class D felonies is two to four years. Tenn. Code Ann. § 40-35-112(a)(4) (1997). The presumptive

sentence for a Class D felony is the minimum in the range when no enhancement or mitigating factors are present. Id. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. Id. § 40-35-210(e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-210; Ashby, 823 S.W.2d at 169.

In the present case, the record reveals that the trial court considered the statutory sentencing principles and complied with appropriate procedures. The trial court reviewed the presentence report and heard the witnesses' testimony at the sentencing hearing, including Defendant's testimony, and listened to the arguments of counsel. Finding that enhancement factors (1) and (7) and mitigating factor (1) applied, the trial court increased Defendant's sentence for both felonies from the presumptive sentence of two years to four years and ordered that they be served concurrently. See Tenn. Code Ann. §§ 40-35-113(1), -114(1), (7), -115(d) (1997).

After a review of the record, we agree that application of the enhancement factor (1) concerning Defendant's prior criminal record was properly used to enhance both of Defendant's felony sentences. Defendant's prior criminal record was presented at the sentencing hearing and considered by the trial court to be "substantial." The trial court's application of enhancement factor (7) is another matter, however. For reasons which follow, enhancement factor (7) is inapplicable under the circumstances presented here.

In State v. Kissinger, our supreme court recognized that enhancement factor (7) specifically relates to a defendant's *motivation* to commit the offense and also inferred that, because of this subjective quality, it is usually difficult for the State to prove. State v. Kissinger, 922 S.W.2d 482, 490-91 (Tenn. 1996). Specifically, the supreme court held that

> Enhancement factor (7), unlike most of the other sentencing factors, calls into question a defendant's reasons for committing a crime. Human motivation is a tangled web, always complex and multifaceted. To prove defendant's motives will always be a difficult task. But the legislature, in its wisdom, has placed that obligation on the state when the state seeks an enhanced sentence.

Id. at 491. Further holding that application of enhancement factor (7) does not require that the pleasure or excitement be of a sexual nature, the supreme court gave the following examples of circumstances when enhancement factor (7) would be applicable:

> An offender who steals because of a pleasure experienced in "not getting caught;" an arsonist who burns houses due to the excitement that watching fire brings; an assaulter who breaks an arm to hear the victim beg for mercy – all may have their sentences enhanced under factor (7) *providing the state produces proof of the factor*.

Id. at 490 (emphasis added).

Later, in State v. Winfield, the supreme court held that a sentencing court may apply an enhancement factor as long as the facts have been established in the record by a preponderance of the evidence. State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000). On de novo review, an appellate court may apply an enhancement factor not found by the trial court if the factor is appropriate for the offense and is established by the record. State v. Roger Dale Lewis, _____ S.W.3d _____, No. M1998-00543-SC-R11-CD, slip op. at 6 (Tenn. May 16, 2001); Winfield, 23 S.W.3d at 283-84.

In Defendant's case, the trial court's entire findings of fact regarding applicability of enhancement factor (7) are contained in the following excerpt from the record:

> The second enhancement factor is it was done to gratify himself. I believe it's #7 in the statute, personal gratification. The Court notes first this is a vandalism. The Court notes that history has taught us many vandalisms are done for fun, to make people feel good, that type of thing. In this case the pre-sentence report at Page– –that the defendant entered the public library, more specifically the Stokely Public Library and while entering he cut himself. A lot of this may not have been intentional. Although the entry was intentional, much of the money damages involved perhaps where he was bleeding which required replacement of various items in the library. But significant to this the pre-sentence report indicates the defendant went upstairs and stomped out ceiling tiles. This does not appear to be associated with something that could have been done accidentally but more done by somebody just trying to tear something up. I guess it just makes them feel good.
>
> The defendant indicates he was– –and I'm referring to the agency statement to Page 3 at the bottom of the report, the Court might understand he cut himself and bleeding on something but he entered the attic and deliberately stomped out ceiling tiles indicating his deliberate acts as distinguished from where he might have been bleeding on items.

At the sentencing hearing, Defendant's attorney specifically asked him whether he had committed the vandalism and burglary to satisfy a desire for excitement. Defendant denied that this was his motivation, submitting instead that the incident was alcohol-related. He claimed that he "had a lot to drink" on the evening of the crime and "could barely stand up." Defendant further stated that he "just went by" the library and "ended up breaking into the [building]," but that he would have never committed the crime if he had been sober. Following these statements, the State thoroughly cross-examined Defendant but failed to develop proof that he had any particular motive to commit the crime. With regard to motivation on his part, the record contains the following statement made by Defendant to the officer who prepared the presentence report:

> I think sometimes I just can't control things and I start to drink. I am sure that I am an alcoholic, but really don't want to admit it. When I do drink, one becomes two,

> two becomes three, until I can remember is not what I want to do, but just stupid stuff. I just go along with the crowd. So when someone said hey let's go see what the library has to see, I just don't think. I haven't darkened a library door long enough to realize that it was stupid to start with. So after we had been drinking at Freddy's we started walking down street. So as we passed the library, I think I threw a rock in the door window. Another guy came in with me. All I could remember is taking a roll of stamps and then picking a computer. When I saw the police pass by the door, I set the computer down and ran. I remember hiding in the woods somewhere near the hospital. When I sobered up a little, I started walking down the street. That's when I was questioned and brought in. I don't really know what happened to the other guy with me. I really don't know him well all I know is his name was Rufus. But after I was completely sober, I realized just what a failure I had become again! I am very sorry for what I did.

Following a review of the record and applicable law, we agree with Defendant that the record does not contain proof that he committed the offense of vandalism to gratify his desire for pleasure or excitement. The mere absence of proof of some other motivation for committing the offense is insufficient to establish, by a preponderance of the evidence, that pleasure or excitement was the motive. Even if statistics showed that this particular motive is commonplace in cases concerning vandalism, this fact alone would be insufficient to prove, by default, that the offense was committed for pleasure or excitement in a case where the motivation is not clearly established by the state.

Thus, we find that the trial court misapplied one enhancement factor. However, we have determined that another enhancement factor, not applied by the trial court, is appropriate for the offense and adequately established by proof in the record under Winfield and Lewis. See State v. Roger Dale Lewis, _____ S.W.3d _____, No. M1998-00543-SC-R11-CD, slip op. at 6 (Tenn. May 16, 2001); State v. Winfield, 23 S.W.3d 279, 283-84 (Tenn. 2000). Based upon Defendant's statement in the pre-sentence report, an additional person was involved in the vandalism and burglary. Since Defendant admits that he took the initiative to throw a rock through the window at the library to commit the crimes, we conclude, by a preponderance of the evidence, that enhancement factor (2) was established in the record, i.e., that the Defendant "was a leader in the commission of an offense involving two (2) or more criminal actors." Tenn. Code Ann. § 40-35-114(2) (1997). Accordingly, even though one enhancement used by the trial court is inapplicable, the record contains sufficient proof to apply two other enhancement factors which justify the length of the sentences imposed by the trial court for both of Defendant's felony convictions.

Regarding the manner of service, Defendant contends that he is presumed by law to be a favorable candidate for probation according to Tenn. Code Ann. § 40-35-102(6) and that the State failed to rebut this presumption. Defendant further argues that the trial court failed to consider the criteria set forth in Tenn. Code Ann. § 40-35-103 and, instead, "arbitrarily" imposed incarceration on Defendant contrary to the law. We disagree.

As a Range I, standard offender convicted of a Class D felony, Defendant is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6) (1997). The presumption in favor of alternative sentencing may be rebutted if (1) "confinement is necessary to protect society by restraining the defendant who has a long history of criminal conduct," (2) "confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or (3) "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." Id. § 40-35-103(1)(A)-(C); see Ashby, 823 S.W.2d at 169. In addition, the defendant's potential for rehabilitation or lack thereof is important when determining whether an alternative sentence is appropriate. Tenn. Code Ann. § 40-35-103(5) (1997).

Determining whether a defendant is entitled to full probation requires a separate inquiry from that of determining whether the defendant is entitled to an alternative sentence. State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995) overruled on other grounds, State v. Hooper, 29 S.W.3d 1 (Tenn. 2000). Two different burdens of proof are involved. When a defendant is presumed to be a favorable candidate for alternative sentencing options, the State has the burden of overcoming the presumption by presenting evidence to the contrary. Id. Where, as here, a defendant wants to be placed on full probation, the defendant must establish his suitability for such sentencing, notwithstanding the statutory presumption regarding alternative sentencing. See Tenn. Code Ann. § 40-35-303(b). When deciding whether to grant probation, the question is "whether or not the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. And this rests in the sound discretion of the court." Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956).

Here, the record shows that the trial court based its decision to deny probation on Defendant's prior criminal record, which the court declared is "substantial." The trial court also considered the propriety of Community Corrections and the nature of the crime, specifically, the fact that Defendant intentionally destroyed a public library, but then concluded that "incarceration [would be] the best recourse in this case." We agree. Defendant has a long history of alcohol abuse and his record contains four alcohol-related offenses within a four-year period, culminating with the instant offense. His wife testified that Defendant has had a drinking problem for the life of their marriage, at least ten years. Furthermore, at the time the pre-sentence report was being prepared, Defendant admitted to the investigating officer that he still drank approximately a six-pack of beer per week and that he had not sought assistance from any alcohol treatment center. We note that this statement contradicts Defendant's testimony at the sentencing hearing that he had not had a drink in six months.

When Defendant's prior criminal record and his long-term, ongoing drinking problem are considered together, Defendant's potential for rehabilitation is not impressive. Since we find that the trial court adequately considered the criteria set forth in Tenn. Code Ann. § 40-35-103 prior to denying Defendant probation, and conclude that Defendant has failed to demonstrate either suitability for full probation or that his release will serve the best interests of either the public or himself, he is not entitled to relief on this issue.

As a final matter, we observe that the judgment form pertaining to Defendant's conviction for burglary contains a clerical error. The statute section number for the conviction offense was entered on the judgment form as T.C.A.# 39-14-408, but this particular number is the section number for the offense of vandalism. The proper statute section for Defendant's burglary conviction is T.C.A.# 39-14-402. We therefore modify the judgment form relating to Count 3 of Defendant's indictment no. 7550 to reflect the correct statute number and affirm the judgment as modified.

## III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the trial court as modified above.

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THOMAS T. WOODALL, JUDGE